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NO. 81-6540

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

HENRY ARTHUR DRAKE,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Georgia Rule prohibiting the granting of a new trial on the basis that a witness has recanted his trial testimony denies Petitioner fundamental fairness and due process of law where Petitioner's convictions could not stand without the trial testimony of the witness who has now recanted that testimony, admitted that it was perjured and excuplated the defendant.

II. Whether the imposition of the death penalty on a defendant would constitute cruel and unusual punishment in violation of the Eighth Amendment where the sufficiency of the conviction upon which that penalty was based rests squarely on the testimony of a witness who has now recanted that testimony, admitting that it was perjured, and has exculpated the defendant of the crimes, and where the state has invoked a rule barring a new trial on the basis of the witness' recanting of his trial testimony.

ARGUMENT

The Respondent, State of Georgia, raised as its first question presented in its "Brief in Opposition to Petition for Writ of Certiorari by the Attorney General" the following:

> "Whether this Court should consider Petitioner's allegations that his constitutional rights under the Eighth and Fourteenth Amendments to fundamental fairness and due process were violated by the denial of his extraordinary motion for new trial, when the federal questions were not presented to the state courts for consideration."

In arguing this question the State asserted that "Petitioner did not raise the constitutional claims of denial of due process and fundamental fairness under the Eighth and Fourteenth Amendments" in the Supreme Court of Georgia in either his enumeration of errors or brief on appeal in that Court.

Petitioner files this reply brief to correct this misstatement by the Respondent. The State apparently overlooked the following language from pages 30 and 31 of Petitioner's Brief on Appeal to the Georgia Supreme Court (R:84-85), which brief the State attached to its own Brief in Opposition to Petition for Writ of Certiorari in this case:

> "As a final point, Appellant believes that the denial of his motion under the circumstances of this case, which indicate that the conviction of Drake was based upon the perjured testimony of the State's key witness, violated the fundamental rights guaranteed him by the Constitution and Laws of the State of Georgia and by the Constitution of the United States, including the right to due process of law (Art. I, Sec. I, Pars. 1, 9, and 11, Georgia Constitution of 1976 (Code Ann. §§2-101, 2-109 and 2-111 respectively); Fifth and Fourteenth Amendments, United States Constitution); the right to a fair trial as embodied by Art. I, Sec. I, Par. 11, Georgia Constitution of 1976 (Code Ann. §2-111) and the Sixth and Fourteenth Amendments to the United States Constitution; and the right to be free from cruel and unusual punishment (Art. I, Sec. I, Par. 14, Georgia Constitution of 1976 (Code Ann. §2-114); Georgia Code Annotated §27-25; Eighth and Fourteenth Amendments, United States Constitution)."

Thus, as pointed out at page 5 of his Petition for Writ of Certiorari, and contrary to the State's assertions, Petitioner's federal claims were, in fact, raised and argued in his appeal to the Georgia Supreme Court and are now properly before this Court for review.

Respectfully submitted,

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